

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY REESE PORTER,

Defendant-Appellant.

UNPUBLISHED

July 23, 2013

No. 310293

Wayne Circuit Court

LC No. 11-004867-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to consecutive prison terms of 7 to 20 years for the CSC I conviction and 5 ¾ to 15 years for the CSC II conviction. We affirm.

The complainant, defendant's niece, first reported the alleged assault to the police when she was 17, approximately six and a half years after it occurred. Defendant was not arrested for this offense until almost four years after the victim's report to the police. Defendant was convicted following his second jury trial. The first trial had ended in a mistrial because of discovery violations.

I

Defendant first argues that the trial court abused its discretion by not permitting defense witness Shirley Anderson to testify about statements defendant had made to her on the ground that her testimony was hearsay. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally not admissible. MRE 802. Defendant does not argue that his statements to Anderson fit within an exception to the hearsay rule; instead he argues that they were not offered for the truth of the matter asserted and were thus not hearsay. The exclusion of evidence is reviewed for an abuse of discretion and questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

At defendant's first trial, Anderson was called as a prosecution witness and testified that she dated defendant in the past. At some point in 2007 or 2008, she learned about the accusations against defendant from the victim's father, told defendant about the accusations, and

told him that he needed to call his mother. Defendant apparently told Anderson that the victim was lying, that he would never do anything like that, and that he was not going to call his mother because they were “on some bullshit.” Defendant stopped going to see members of his family after that.

Defendant wanted to call Anderson at his second trial. The prosecution objected. Defendant argued that his statements to Anderson would not have been offered to prove the truth of the matter asserted—that he did not assault his niece—but rather to establish why he did not have contact with his family after the accusations were known. In general, statements offered to show the effect on the listener or to show a person’s state of mind are not hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995), overruled in part on other grounds, *People v Houthoofd*, 487 Mich 568; 790 NW2d 315 (2010). Accordingly, the trial court may have erred by excluding the statements, which defendant offered solely to prove his own state of mind.

However, even if the trial court abused its discretion by excluding defendant’s statements to Anderson, this error does not warrant appellate relief. Defendant cannot establish that, more probably than not, the trial court’s evidentiary ruling on this matter affected the outcome of his trial. MCL 769.26; *Lukity*, 460 Mich at 496. Defendant’s statements to Anderson concerning his reasons for not contacting his mother did not make it any more or less likely that he committed the crimes. Any error in excluding the statements was harmless, and we perceive no error requiring reversal.

II

Defendant raises several additional issues in a supplemental brief filed *in propria persona*. We address them in turn.

A

Defendant argues that the district court erred by binding him over on the charge of CSC I where there was no evidence of sexual penetration. We review for an abuse of discretion the district court’s decision to bind over a defendant on a felony charge. *People v Yost*, 468 Mich 122, 126-127; 695 NW2d 604 (2003).

The function of a preliminary examination is to determine if a felony has been committed and whether there is probable cause to believe that the defendant committed the felony. The prosecution must present evidence from which at least an inference may be drawn to establish the elements of the felony charged. *Id.* at 125-126. The elements of CSC I, MCL 750.520b(1)(a), are (1) that the defendant engaged in sexual penetration with another person and, (2) that the person was under 13 years of age. *People v Lockett*, 295 Mich App 165, 187-188; 814 NW2d 295 (2012). It is undisputed that the victim was under the age of 13 at the time of the incident.

Sexual penetration includes any intrusion, however slight, of any part of a person’s body into the genital or anal opening. MCL 750.520a(r). At the preliminary examination, the victim testified that defendant tried to insert his penis into her vagina, that his penis actually touched the hole where babies come out, and that he kept trying to put it in but it hurt and she cried. From

this testimony, it can be inferred that defendant's penis intruded, "however slight[ly]," into the victim's vaginal opening. See MCL 750.520a(r). The district court did not abuse its discretion by finding that there was probable cause to believe that defendant committed CSC I in this case. For the same reason, the circuit court did not err by denying defendant's motion to quash the bind over.

B

Next, defendant argues that his constitutional rights were violated because he was not arrested for three and a half years after a warrant was issued. This Court reviews constitutional questions de novo. *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009). "There is no constitutional right to be arrested." *Id.* The question is whether the record presents evidence of prejudice resulting from the delay. For a violation of due process rights to occur, there must be actual and substantial prejudice and intent by the prosecution to gain a tactical advantage. *Id.* Substantial prejudice is defined as "that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of proceedings was likely affected." *Id.* at 37. The defendant must show more than generalized allegations of prejudice. *Id.*

Here, there was no evidence that the prosecution had any intent to gain a tactical advantage. Police witnesses testified that they went to defendant's last known address. When they did not find him there, they placed the warrant in the LEIN system and turned the warrant over to the Fugitive Apprehension Team. Their testimony showed, at most, negligence rather than any intent to gain a tactical advantage.

More importantly, defendant's offer of proof with regard to prejudice consisted merely of generalized allegations. Defendant claimed that his memory was dulled due to the passage of time and that he was unable to reach unnamed associates who may have been potential alibi witnesses. But much of this can be attributed to the victim's delay in reporting the crime. Further, the victim's allegations were not specific. She did not say the crime occurred on a specific day or even a specific month. Therefore, any alibi testimony would not be persuasive. Defendant has not established substantial prejudice or that the outcome of the proceedings was likely affected by the delay in his arrest. Defendant's due process rights were not violated by the delay in his arrest.

C

Defendant next argues that the trial court abused its discretion by fashioning an improper remedy for the prosecution's discovery violations and that his right to be free from double jeopardy was violated.

A trial court's remedy for a violation of the discovery rules is reviewed for an abuse of discretion. MCR 6.201(J); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Whether defendant's retrial was barred by double jeopardy is a constitutional issue that we review de novo on appeal. *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010).

Before opening statements at defendant's first trial, it was discovered that defendant was not provided with statements from two witnesses, the victim's mother and another unnamed witness, apparently because of an undiscovered clerical error. It was later discovered that defendant was not provided with an updated police report. On the morning before the second day of testimony, it was revealed that the prosecution had discovered a statement by defendant the night before and had just provided the statement to defendant. The prosecution had not previously been aware of this statement but intended to admit the statement at trial. Defendant sought dismissal with prejudice because of the late receipt of the discovery, or, in the alternative a mistrial.

The trial court found that defendant's defense strategy was undermined by the late discovery, that there was no intentional attempt to gain a tactical advantage by the prosecution, and that the matter did not warrant dismissal with prejudice. The trial court further found that there was manifest necessity for a mistrial and granted defendant's request for a mistrial. Defendant later renewed his motion for dismissal with prejudice and the trial court again denied the motion for dismissal, stating that dismissal was not the only remedy suitable in the interests of justice and that a mistrial was sufficient.

The Michigan Court Rules require mandatory disclosure of witness statements. MCR 6.201(A)(2) requires a party to provide to other parties "any written or recorded statements, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement." Further, MCR 6.201(B)(3) requires the prosecution, upon request, to provide discovery of "any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial." The prosecution also has a continuing duty to disclose and promptly notify the defendant of additional information without further request. MCR 6.201(H).

The trial court correctly found that the prosecution violated these discovery rules. But the court rules provided the trial court with substantial discretion and latitude to remedy these discovery violations. See MCR 2.601(J). The trial court was required to balance the interests of the public, the court, and the parties in light of all relevant circumstances. *People v Greenfield*, 271 Mich App, 442, 454 n 10; 722 NW2d 254 (2006).

Defendant argues that the charges should have been dismissed with prejudice. Dismissal is a drastic sanction to be used where discovery violations are flagrant and wanton, conscious or intentional. *Frankenmuth Mutual Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). Although there were several violations, none was intentional, flagrant, or wanton. The trial court did not abuse its discretion by denying defendant's motion for dismissal with prejudice and instead granting a mistrial.

Defendant also argues that he was forced to request a mistrial because of the prosecution's discovery violations and that, therefore, his retrial violated double jeopardy. The Fifth Amendment protects criminal defendants from being twice placed in jeopardy for the same offense. *Szalma*, 487 Mich at 715-716. The Michigan Constitution provides the same protection. *Id.* However, "[w]here the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by

factors beyond their control, or by defense counsel himself, retrial is . . . generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim.” *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). As already noted, the prosecution’s discovery violations were innocent and not purposeful. Moreover, defendant requested the mistrial. Therefore, retrial was permitted and defendant’s constitutional protection against double jeopardy was not violated. See *id.*

D

Defendant also argues that his trial counsel was ineffective. Because this issue is unpreserved, our review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to obtain a new trial, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different. *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012).

Defendant first contends that trial counsel rendered ineffective assistance by failing to consult with an expert on the psychology of sexual abuse or educate himself sufficiently on the scientific issues in order to effectively cross-examine the witnesses. Trial counsel sought an expert in delayed reporting of sexual abuse, and the trial court approved payment, but the trial court ultimately did not allow the expert to testify because it found that the expert’s testimony would not assist the trier of fact. Nevertheless, the proposed expert witness, a licensed clinical psychologist, wrote that her “analysis, conclusions, and opinions are derived from my specialized education, experience, and clinical training in the assessment of sexual abuse investigations, as well as treatment of victims and offenders in sexual abuse cases.” Therefore, it appears that trial counsel did consult with an expert in the psychology of sexual abuse. Further, defendant does not identify any substantial defense of which he was deprived dealing with the science of sexual abuse. We conclude that counsel’s performance did not fall below an objective standard of reasonableness, especially given that counsel sought and retained an expert and no substantial defense has been identified.

Defendant further contends that trial counsel failed to investigate the case appropriately. If defense counsel fails to exercise reasonable professional judgment when deciding to forego a particular investigation, counsel’s performance falls below an objective standard of reasonableness. *Trakhtenberg*, 493 Mich at 53. Here, however, defendant fails to identify what trial counsel failed to investigate. Trial counsel sought the appointment of a private investigator in this matter, and one was appointed. Without identifying a specific area that trial counsel failed to investigate, defendant cannot establish ineffective assistance of counsel.

E

Defendant argues that his due process rights were violated by prosecutorial misconduct. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant’s substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

Defendant first contends that the prosecutor knowingly presented false testimony because the victim's version of events was physically impossible. We fully acknowledge that a conviction obtained through the knowing use of perjured testimony violates a defendant's due process rights. *People v Aceval*, 282 Mich App 379, 389-390; 764 NW2d 285 (2009). But the prosecution did not knowingly present false testimony in this case. The incident on which the charges were based occurred more than 10 years before trial, and there was no testimony that police or the prosecutor went to the crime scene. Although defendant asserts that the brother could not have been halfway down the stairs, and could not have seen the assault as the victim testified, there is no evidence that the prosecutor had any knowledge of the layout of the basement. Further, the victim's testimony was not that the brother came halfway down the stairs during the assault. Both at the preliminary examination and at the second trial, the victim testified that she and defendant heard the brother coming and that defendant jumped up. Further, the brother did not testify. Thus, there is no way of knowing whether he saw anything. There is no evidence that the prosecution knowingly presented false testimony on this issue.

Defendant additionally contends that the prosecution repeatedly vouched for the credibility of its witnesses and argued facts not in evidence during its opening statement and closing argument. Defendant does not, however, point to any specific instances of misconduct. A prosecutor may not vouch for the credibility of witnesses by implying that he has some special knowledge of their truthfulness, but may comment on the credibility of his own witnesses, especially where there is conflicting evidence. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

The prosecution's opening statement was short and the prosecutor did not vouch for the credibility of the witnesses. The prosecutor merely stated what the jury would hear from the victim with no comment on the victim's credibility. Further, the prosecutor's opening statement was true to the evidence presented with one minor exception. Finally, the prosecutor's closing argument and rebuttal addressed the consistencies in the victim's testimony and did not address facts not in evidence. We perceive no prosecutorial misconduct on the record before us.

F

Lastly, defendant argues that there was insufficient evidence presented at trial to establish the elements of CSC I. We review the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

As previously noted, to prove CSC I under MCL 750.520b(1)(a), the prosecution must establish that the defendant engaged in sexual penetration with a person under 13 years of age. *Lockett*, 295 Mich App at 187-188. "Sexual penetration" includes any intrusion, "however slight," of any part of a person's body into the genital or anal opening. MCL 750.520a(r). The victim testified at trial that, when she was 10 years old, defendant attempted to insert his penis into her vagina, that his penis actually touched her vagina or "the hole" where babies come out, and that it hurt her. The victim's testimony concerning pain provided ample, circumstantial evidence of penetration. "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins*, 259 Mich

App 545, 554; 675 NW2d 863 (2003). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Moreover, in a prosecution for criminal sexual conduct, “[t]he testimony of a victim need not be corroborated[.]” MCL 750.520h. Viewing the evidence in a light most favorable to the prosecution, the victim’s testimony and associated circumstantial evidence of penetration was sufficient to establish the elements of CSC I beyond a reasonable doubt.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Michael J. Kelly